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No.

IN THE

Supreme Court Of The United States

OCTOBER TERM, 1983

PETER WALTON

Appellant

v.

ALASKA BAR ASSOCIATION

Appellee

ON APPEAL FROM THE SUPREME COURT OF THE STATE OF ALASKA

JURISDICTIONAL STATEMENT

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QUESTIONS PRESENTED

1. Does the due process clause of the Fourteenth Amendment to the Constitution of the United States require that when fraud is alleged in attorney discipline proceedings proof must be by clear and convincing evidence?

2. Does the equal protection clause of the Fourteenth Amendment to the Constitution of the United States require that proof be by clear and convincing evidence in attorney discipline proceedings when the standard of proof in judicial disciplinary proceedings is by clear and convincing evidence?

TABLE OF CONTENTS

Page

QUESTIONS PRESENTED i
TABLE OF CASES AND AUTHORITIES iii
INTRODUCTION 2
OPINION BELOW 4
JURISDICTION 4
REGULATORY AND CONSTITUTIONAL PROVISIONS INVOLVED 5
STATEMENT OF THE CASE 7
THE QUESTION PRESENTED IS SUBSTANTIAL 13
CONCLUSION 19
APPENDICES:
I. OPINION OF THE SUPREME COURT OF ALASKA
II. OPINION OF THE SUPREME COURT OF ALASKA ON REHEARING
III. NOTICE OF APPEAL AND CERTIFICATE

TABLE OF AUTHORITIES

CASES: *Page*

ADDINGTON v. TEXAS, 441 U.S. 418 (1979) 14, 19
BANK OF POCAHONTAS v. FERIMER, 170 S.E. 591, (Va. 1933) 16
BOWE v. GAUGE, 106 N.W. 1074, (Wisc. 1906) 16
FLORIDA BAR v. QUICK, 279 So.2d 4 (Fla. 1973) 17
IN RE GAULT, 387 U.S. 1 (1967) 14
IN RE HANSON, 532 P.2d 303 (Alaska 1975) 2, 17
IN RE RUFFALO, 390 U.S. 544 (1968) 13, 16
IN THE MATTER OF J. MAY, 538 P.2d 787 (Idaho 1975) 18
SANTOSKY v. KRAMER, 455 U.S. 745 (1982) 18
WEININGER v. METROPOLITAN FIRE INSURANCE CO., 195 N.E. 420 (Ill. 1935) 16
WOODBY v. INS, 385 U.S. 276 (1966) 16

UNITED STATES CONSTITUTIONAL PROVISIONS:

FOURTEENTH AMENDMENT TO THE CONSTITUTION OF THE UNITED STATES 6

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JURISDICTIONAL STATEMENT

INTRODUCTION

This is an appeal from the opinion of the Supreme Court of the State of Alaska announced on October 10, 1983 and in which re-hearing was granted in part on January 3, 1984. In a three justice *Per Curiam* decision with two dissenters, the Alaska Supreme Court decided, *inter alia,* that a preponderance of the evidence showed that Appellant Peter Walton had fabricated false evidence in violation of DR1-102 and DR7-102 of the Code of Professional Responsibility. In so doing the majority upheld the preponderance of the evidence standard of Alaska Bar Rule 15(f) notwithstanding that the same Court had previously held that proof by clear and convincing evidence was required in disciplinary proceedings against a judge. *In Re Hanson,* 532 P.2d at 303, 308 (Ak. 1975). Former Chief Justice Rabinowitz, with whom Justice Matthews joined, dissented:

> I dissent from the majority's rejection of Walton's due process claim as it relates to the applicable burden of proof in bar disciplinary matters. I further dissent from the majority's affirmance of the Disciplinary Board's findings of fact regarding Walton's alleged violation of the various Disiplinary Rules involved in this proceeding. Employing a clear and convincing burden of proof, my review of the record persuades me that the bar has only demonstrated that Walton's conduct was both negligent and grossly negligent, thus violative of DR 1-102(A)(5) and (6). I would therefore impose the sanction of a public censure.
>
> * * *
>
> In my view, the United States Supreme Court's decision in *Santosky v. Kramer,* 455 U.S. 745, 71 L.Ed.2d 599 (1982) furnishes persuasive support for Walton's position. In Santosky, the court was called upon to determine whether the "preponderance of the evidence" or "clear and convincing" standard should be applied in parental rights termination proceedings. Applying the three factors enunciated in Mathews v. Eldridge, 424 U.S. 319, 335, 47 L.Ed.2d 18, 33 (1976), which governs a determination

of what process is due under the Fourteenth Amendment in any given fact situation, [footnote omitted] the Santosky court concluded that the first factor, the importance of the individual interests at stake, dictated that a clear and convincing standard be applied:

> This Court has mandated an intermediate standard of proof — "clear and convincing evidence" — when the individual interests at take in a state proceeding are both "particularly important" and "more substantial than mere loss of money." *Addington v. Texas,* 441 U.S. at 424, 60 L.Ed.2d 323, 99 S.Ct. 1804. Notwithstanding "the state's 'civil labels and good intentions,'" id., at 427, 60 L.Ed.2d 323, 99 S.Ct. 1804, quoting *In Re Winship,* 397 U.S. at 365-366, 25 L.Ed.2d 368, 90 S.Ct. 1068, 51 Ohio Ops. 2d 323, the Court has deemed this level of certainty necessary to preserve fundamental fairness in a variety of government-initiated proceedings that threaten the individual involved with a "a significant deprivation of liberty" or "stigma". 441 U.S. at 425, 426, 60 L.Ed.2d 323, 99 S.Ct. 1804. See, e.g., *Addington v. Texas,* supra, (civil commitment); *Woodby vs. INS,* 385 U.S. at 285, 17 L.Ed.2d 362, 87 S.Ct. 483 (deportation); *Chaunt v. U.S.,* 364 U.S. 350, 353, L.Ed.2d 120, 81 S.Ct. 147 (1960) (denaturalization); *Schneiderman v. U.S.,* 320 U.S. 118, 125, 159, 87 L.Ed. 1796, 63 S.Ct. 1333 (1943) (denaturalization).

455 U.S. 745, 71 L.Ed.2d 599 at 608-09. I think it apparant that the individual interests at stake in a bar disciplinary proceeding are "particularly important and more substantial than the mere loss of money" to the attorney involved. The proceedings stigmatize the attorney and threaten him with a significant deprivation of liberty.

The second *Eldridge* factor, whether the Bar Rule's chosen standard creates a risk of error, again weighs in favor of adopting the clear and convincing evidence stan-

dard. This is evidenced by the facts of the instant case. If Walton is indeed innocent of the allegations made against him, the risk of wrongful discipline would be significantly reduced by using the clear and convincing evidence standard.

Concerning the third *Eldridge* factor, it is clear that the state has an interest in protecting society from attorneys who have violated bar disciplinary rules. [Footnotes omitted] The Supreme Court has characterized the preponderance of the evidence standard as placing the risk of error equally upon the parties. When adopting the clear and convincing evidence standard in *Addington v. Texas*, 441 U.S. 418, 427, 60 L.Ed.2d 323 (1978), the Supreme Court stated "[t]he individual should not be asked to share equally with society the risk of error when the possible injury to the individual is significantly greater than any possible harm to the state." The dispositive inquiry thus becomes whether the potential injury to the attorney from an incorrect determination of a violation of the disciplinary rules is "significantly greater" than the possible harm to the state caused by: (1) an incorrect determination that an attorney has not violated the rules, and (2) the increased burden on the state of meeting the higher standard of proof....

App. I, pp. 20-23.

This Jurisdictional Statement is submitted to show that the United States Supreme Court has jurisdiction of this appeal and a substantial question concerning the denial of the due process and equal protection of law is presented meriting plenary consideration.

OPINION BELOW

The Opinion of the Supreme Court of the State of Alaska, not yet reported, appears in Appendix I.

JURISDICTION

Notice of Appeal and this Jurisdictional Statement were filed within ninety days of the Opinion on Rehearing date, Appendices II, III. This Court's jurisdiction is invoked under

28 USC 1257(2). The Supreme Court of Alaska specifically ruled that Alaska Bar Rule 15 which provides in pertinent part that it need be demonstrated only by "the preponderance of the evidence that the respondent has, by act or omission, committed an offense as provided in Rule 11" does not violate the Fourteenth Amendment to the Constitution of the United States: "Thus, we reject Walton's position that proof by clear and convincing evidence is required as a matter of Federal due process." *Id.* at App. II, p. 3. The Alaska majority acknowledged in footnote 8 of its Opinion that nonetheless the clear and convincing standard was appropriate to judicial disciplinary proceedings, noting only that this standard may have to be re-evaluated in an unspecified future case.

REGULATORY AND CONSTITUTIONAL PROVISIONS INVOLVED

Alaska Bar Rule 15, having the force of law, provides in pertinent part as follows:

> (f) Following the service of the answer or the expiration of the time for service of an answer, if there are any issues of fact raised by the pleadings or if the Respondent requests, within the time allowed to answer, the opportunity to be heard in mitigation, the matter shall be assigned to a Hearing Committee. After said assignment the Administrator shall serve a notice of hearing upon the Respondent, or his counsel, indicating the date and place of the hearing, and the names and addresses of the members of the Hearing Committee before whom the matter will be heard. The notice of hearing shall be advise the Respondent that he is entitled to be represented by counsel, to examine and cross-examine witnesses, to present evidence in his own behalf, to have subpoenas issued in his behalf, to challenge peremptorily and for cause members of the Hearing Committee as provided in subparagraphs (c) and (d) above, and to have an attorney appointed to represent him as provided in Rule 22 below. *The Administrator shall have the burden at such hearings of demonstrating by the preponderance of*

the evidence that the Respondent has, by act, or omission, committed an offense as provided in Rule 11. The rules of evidence applicable in administrative hearings shall apply in all hearings before hearing Committees. (Emphasis supplied.)

The Fourteenth Amendment to the Constitution of the United States provides:

Sec. 1. Citizenship rights are not to be abridged by states. All persons born or naturalized in the United States, and subject to the jurisdiction thereof, are citizens of the United States and of the state wherein they reside. No state shall make or enforce any law which shall abridge the privileges or immunities of citizens of the United States; nor shall any state deprive any person of life, liberty, or property, without due process of law; nor deny to any person within its jurisdiction the equal protection of the law.

DR 1-102 provides:

Misconduct.

(A) A lawyer shall not:

(1) Violate a Disciplinary Rule.

* * *

(3) Engage in illegal conduct involving moral turpitude.

(4) Engage in conduct involving dishonesty, fraud, deceit, or misrepresentations.

(5) Engage in conduct that is prejudicial to the administration of justice.

(6) Engage in any other conduct that adversely reflects on his fitness to practice law.

DR 7-102 provides:

Representing a Client Within the Bounds of the Law.

(A) A lawyer shall not:

(3) Conceal or knowingly fail to disclose that which

he is required by law to reveal.

* * *

(6) Participate in the creation of preservation of evidence when he knows or it is obvious that the evidence is false.

STATEMENT OF THE CASE

Anchorage attorney Peter Walton has been erroneously found guilty of fabricating an exhibit and attaching it to an amended complaint with the specific intent to mislead. Peter Walton is innocent of any intentional wrongdoing. The exhibit was intended to be used and was in fact used only as an illustration of his client's theory of the case as alleged in the amended complaint. When a question as to the exhibit's authenticity first arose, Walton fully explained the exhibit's origins and purpose. Indeed, two members of the Supreme Court of the State of Alaska are convinced that Walton did not intend to deceive anyone.

Speaking for himself and Justice Matthews, Justice Rabinowitz stated that the reason that he was "convinced [that] Walton did not intend to deceive" (*ibid.* p. 26), was based upon his study of the record. He set forth eight factors arguing for innocence:

1. Walton did not use the fabricated document in the deposition of Childs even though it was in existence at that time. If he had had any intent of using the document as evidence it would seem that he would have confronted Childs with it.

2. It is difficult to understand what Walton had to gain by foisting the fabricated copy off as an actual photocopy. It is undisputed that the document Childs recorded was materially different than the document Childs signed. That is all that the fabricated document, if it were taken to be real, would demonstrate.

3. There was little chance of any deception succeeding. Walton did not surreptitiously fabricate the document but did so in the presence of Cowden and of Lee Holen,

a contract law clerk. The record is not clear on whether other people were present, but is clear that opposing counsel, Wade, had heard that Walton had been using some white-out and a xerox machine in connection with the case, before Wade even received the fabricated document.

4. When ambiguous responses were given by Cowden at his desposition (which was taken only one day after the fabricated document had been filed with the court) Walton promptly elicited the truth of the matter on cross examination.

5. The care exercised by Walton in preparing the exhibit says as much about Walton's compulsive nature as about any intent to deceive.

6. Walton's "decision to ignore the warnings of a colleague regarding the possible misinterpretation of the reference to the document" is again equally consistent with innocent as with guilt.

7. The "smoking gun" memorandum was a memo from Walton to Cowden to which the exhibit was attached. It stated, "Dear Frank: Guess what? Here's the smoking gun. Either Childs falsely testified when he said he gave Lily a copy of his deed of trust on March 2nd, or he falsely testified when he said it hadn't been altered after [executing] it. But in that case he will have difficulty explaining why he concealed the fact of its alteration. Cheers, Pete Walton." The memo was not a communication to the court or opposing counsel. It was a communication to a client that could be clarified subsequently. It does not constitute evidence of any intent to mislead the court or opposing counsel.

8. The fabricated document was attached to the complaint and to a memorandum in opposition to a motion to dismiss which was filed on the same day as the complaint. It appears that the motion to dismiss was of no particular consequence and that Walton was told by Wade before the opposition was filed that Wade was going to withdraw the motion to dismiss.

Dissenting Opinion pp. 27-30.

The prosecuting attorney for the Alaska Bar Association conceded in his closing argument before the Disciplinary Hearing Committee that:

> The evidence is not here clear that there is an intentional deception on the part of Mr. Walton, except that he intentionally included this document in his pleadings and intentionally used the language that he did. As to whether he intended to deceive the court there is very little evidence of that except that again he intentionally included it in the pleadings which were filed with the court. Obviously when faced with it or when the question about these documents became apparent, he took steps to clear up the matter, and whatever you believe about his other actions this certainly should be considered in his behalf.

Tr. 223.

On May 11, 1978 the case at bar was percipitated when defense counsel Wade filed a motion for sanctions against Walton and his client in the case of *The Aleut Corporation v. L. William Childs*, filed weeks earlier in Anchorage Superior Court. Childs was the former business manager of the Aleut Corporation and was also being sued by the Aleut Corporation for multiple breaches of his employment contract in an earlier 1975 case which had come to trial on March 1, 1978.

During this trial, an issue arose concerning corporate loans to relatives, officers and directors. This prompted the Corporation's vice-president, Cowden, to review all of the Corporation's outstanding loans. He discovered that a loan for $13,000 had been made to Childs by the Corporation in March, 1973 which he believed to be illegal because it was in violation of the Alaska Native Claims Settlement Act and the Corporation's Articles of Incorporation.

---

[1] The Aleut Corporation is a Regional Corporation formed pursuant to the Alaska Native Claims Settlement Act. PL 92-203.

Cowden was troubled by something else about the loan paperwork. The $13,000 note recited on its face that it was "secured by a deed of trust," yet no deed of trust could be found among the Corporation's records and none of the officers or board members knew of any such instrument. A recorded deed of trust from Childs to the Corporation was located at the District Recorder's Office and brought to Walton's attention around March 10, 1978. (Tr. 122, 156, 172-173).

The recorded deed of trust was suspicious in a number of respects. Although the promissory note referred to a "deed of trust" by which it was secured, the deed of trust which Childs had actually recorded was specifically denominated as a "Second Deed of Trust." Furthermore, it contained a subordination clause stating that it was subordinated to a $47,000 deed of trust *subsequently* executed to the Alaska Mutual Savings Bank. The subordination clause stated that the Bank's first deed of trust was recorded on March 6, 1973, four days *after* the deed of trust in favor of the Corporation had been executed by Childs before a notary. The original deed of trust had thus been altered after execution by the insertion of the subordination clause. A second law suit was filed against Childs to recover the $13,000.

Concurrently, the trial of the 1975 case was unexpectedly recessed due to the sudden illness and subsequent death of Childs' counsel. (Tr. 173). During this respite Childs' deposition was taken. Childs testified that he signed the promissory note on March 2, 1973, and that he executed the deed of trust and delivered a copy of it to the Corporation on the same date. He further testified that the deed of trust had not been altered after he signed it. (Tr. 180). The deposition was adjourned.

This testimony of Childs appeared false in light of the fact that the subordination clause of the deed of trust referred on its face to another deed of trust to Alaska Mutual Savings Bank which had been executed and recorded four days later. It was apparent that the subordination clause had been inserted in the deed of trust sometime after it was signed on March 2, 1972, but before its recordation on October 6, 1983.

Childs' deposition was resumed on April 21, 1978, and he recanted portions of his prior testimony. He now testified that the original deed of trust was indeed altered after he signed it by adding the subordination clause, but he claimed that the alteration had been previously agreed to by the parties. (Tr. 181). The Aleut Corporation maintained that it had never approved such a transaction.

Based on the deposition testimony of Childs, Walton prepared and filed an Amended Complaint in the new action. Exhibit "C" to the amended Complaint was a copy of the deed of trust as it was altered and later recorded by Childs. Exhibit "B" to the Amended Complaint, the document at issue, was an illustrative depiction of how Walton believed the original deed of trust appeared when signed by Childs and notarized on March 2, 1973 (Tr. 190). This illustrative depiction was based on Childs' deposition testimony.

Walton created illustrative Exhibit "B" by making a Xerox copy of the deed of trust as altered and recorded by Childs. Using this copy, Walton then blanked out what he believed to be the provisions wrongfully added to the instrument after its execution and the markings imprinted by the District Recorder. He thereby created an accurate, representative manifestation of the Corporation's allegations against Childs. Exhibit "B" was appropriately described and identified in paragraph 4 of the Amended Complaint:

> 4. Accordingly, on 2 March 1973, for the purpose of financing a downpayment in connection with defendants obtained funds from the plaintiff totaling $13,000, repayment of which they professed would be made according to the terms of a Promissory Note attached hereto marked Exhibit A. At the same time, defendants executed a Deed of Trust for the benefit of the plaintiff Corporation and delivered a copy thereof to the president and secretary of the plaintiff Corporation. *A copy of that copy is attached hereto marked Exhibit "B".*
>
> 5. The original Deed of Trust was either retained by defendant L. William Childs, or at his direction, was left with a legal secretary named Susan Abbott, then

> employed by attorneys for the plaintiff Corporation. On its face, the original Deed of Trust *(of which a copy is attached marked Exhibit B)* appeared to be a first Deed of Trust, not secondary to any other lien on the subject property.
>
> 6. Either by express representations or by his silence, defendant L. William Childs represented to plaintiff and/or led the plaintiff to reasonably believe that the said Deed of Trust, Exhibit B, was a first Deed of Trust and not subordinate to any other lien on the subject property.... (Emphasis Supplied)

On May 2, 1978, Childs' attorney noticed the deposition of Aleut Vice President Cowden who had been present when Walton prepared one page of the illustration. At no time prior to this deposition did Childs' attorney ever make any inquiry as to the authenticity of Exhibit "B" nor was any such representation made by Walton. At the deposition Walton himself elicited all of the circumstances surrounding his reconstruction of Exhibit "B". Walton himself brought forth that Exhibit "B" was only a graphic depiction and illustration of the Corporation's allegations to show how the original deed of trust had been altered. (Cowden deposition at 26).

A grievance procedure was initiated against Walton by the Alaska Bar Association. At the hearing before the Hearing Committee, Child's attorney conceded that Walton had fully disclosed on his own initiative precisely how Exhibit B to the Amended Complaint was created. Tr. 48-49. Childs' attorney admitted that his Motion for Sanctions was filed only as a "tactical matter" (p. 101), and that prior to the Cowden deposition he had never asked Walton about Exhibit "B". Tr. 106-107.

Walton's attorney law clerk testified about the creation of illustrative Exhibit "B":

> Q. Did Mr. Walton ever say anything to you or in your presence that would have led you to believe that it was his intention to take that created document and offer it

as evidence or as proof or can you tell the court that this was really a document that came from the files of the Aleut Corporation.

A. No, he didn't, it was always referred to as illustrative or as illustrating the theories of the lawsuit.

* * *

Tr. 126.

Aleut Vice President Cowden was also present when Exhibit "B" was prepared. He testified it was for illustrative purposes only and not for deception.

The Board of Governors of the Alaska Bar Association concluded that Exhibit B to the 1978 Amended Complaint was intentionally fraudulent and that he be suspended for a period of 18 months. A one member majority of the Supreme Court of Alaska agreed, finding that only a preponderence of the evidence before the Board of Governors was necessary to show fraud and ordered that Walton be suspended for eighteen months. This appeal has followed.

THE QUESTIONS PRESENTED ARE SUBSTANTIAL

This Court held in *In Re Ruffalo,* 390 U.S. 544 (1968) that a lawyer charged with misconduct in disbarment proceedings is entitled to due process under the Fourteenth Amendment. The Court stated:

> Disbarment, designed to protect the public, is a punishment or penalty imposed on the lawyer. *Ex parte Garland,* 4 Wall. 333, 380; *Spevack v. Klein,* 385 U.S. 511, 515. He is accordingly entitled to procedural due process, which includes fair notice of the charge. See *In Re Oliver,* 333 U.S. 257, 273.
>
> * * *
>
> *These are adversary proceedings of a quasi-criminal nature.* Cf. *In Re Gault,* 387 U.S. 1, 33.
>
> 390 U.S. 550, 551, (footnote omitted) (emphasis added.)

In holding that attorney disciplinary proceedings are quasi-criminal, this Court cited *In Re Gault*, 387 U.S. 1, 33 (1966). In *Gault* this Court held that the constitutional guarantees of due process apply to proceedings in which juveniles are charged as delinquents, finding those proceedings to be quasi-criminal. Walton here urges that due process requires the use of a clear and convincing standard of evidence in attorney disciplinary proceedings as they are quasi-criminal, particularly when fraud is alleged.

In *Addington v. Texas*, 441 U.S. 418 (1979) this Court adopted the clear and convincing standard of proof as being required by the Fourteenth Amendment in a civil proceeding brought under state law to commit an individual to a state mental hospital:

> The function of a standard of proof, as that concept is embodied in the due Process Clause and in the realm of fact finding, is to "instruct the fact finder concerning the degree of confidence our society thinks he should have in the correctness of factual conclusions for a particular type of adjudication." *In Re Winship*, 397 U.S. 358, 370 (1970) (Harlan, J., concurring). The standard serves to allocate the risk of error between the litigants and to indicate the relative importance attached to the ultimate decision.
>
> Generally speaking, the evolution of this area of the law has produced across a continuum three standards or levels of proof for different types of cases. At one end of the spectrum is the typical civil case involving a monetary dispute between private parties. Since society has a minimal concern with the outcome of such private suits, plaintiff's burden of proof is a mere preponderance of the evidence. The litigants thus share the risk of error in roughly equal fashion.
>
> In a criminal case, on the other hand, the interests of the defendant are of such magnitude that historically and without any explicit constitutional requirement they have been protected by standards of proof designed to exclude

as nearly as possible the likelihood of an erroneous judgment. In the administration of criminal justice, our society imposes almost the entire risk of error upon itself. This is accomplished by requiring under the Due Process Clause that the state prove the guilt of an accused beyond a reasonable doubt. *In Re Winship*, supra.

The intermediate standard, which usually employs some combination of the words "clear", "cogent", "unequivocal" and "convincing", is less commonly used, but nonetheless "is no stranger to the civil law." *Woodby v. INS*, 385 U.S. 276, 285 (1966). See also McCormick, Evidence Sec. 320 (1954); 9 J. Wigmore, Evidence Sec. 2498 (3d ed. 1940). *One typical use of the standard is in civil cases involving allegations of fraud or some other quasi-criminal wrongdoing by the defendant. The interests at stake in those cases are deemed to be more substantial than mere loss of money and some jurisdictions accordingly reduce the risk to the defendant of having his reputation tarnished erroneously by increasing the plaintiff's burden of proof.* Similarly, this Court has used the "clear, unequivocal and convincing" standard of proof to protect particularly important individual interests in various civil cases. See, e.g., *Woodby v. INS*, supra, at 285 (deporation); *Chaunt v. United States*, 364 U.S. 350, 353 (1960) (denaturalization); *Schneiderman v. United States*, 320 U.S. 118, 125, 159 (1943) (denaturalization). (Emphasis supplied).

* * *

In cases involving individual rights, whether criminal or civil, "[t]he standard of proof [at a minimum] reflects the value society places on individual liberty."

Id.441 U.S. 423-425 (footnotes omitted) (emphasis added).

Society should have a high degree of confidence in the correctness of factual conclusions in attorney disciplinary proceedings, particularly where fraud has been alleged. Since society has minimal concern with the outcome of private suits,

plaintiff's ordinary burden of proof is a mere preponderance of the evidence, the litigants thus sharing the risk in a roughly equal fashion. However, where a civil case involves allegations of fraud or some other quasi-criminal wrongdoing the clear and convincing evidence standard is appropriately used. *Ruffalo, supra,* stands for the proposition that attorney disciplinary proceedings are indeed quasi-criminal, which can hardly be doubted considering the penalty imposed upon Peter Walton. In synthesis with *Addington,* due process requires that clear and convincing evidence be the predicate for attorney discipline, particularly where intentional wrongdoing is alleged.

In the case at bar actual fraud is asserted which gives an independent ground for adoption of the clear and convincing evidence standard. At common law and today allegations of fraud have required proof by clear and convincing evidence. *Woodby v. INS,* 385 U.S. 276, 285, n. 18, (1966); *Weininger v. Metropolitan Fire Ins. Co.,* 195 N.E. 420, 426 (Ill. 1935); *Bank of Pocahontas v. Ferimer,* 170 S.E. 591, 592 (Va. 1933); *Bowe v. Gauge,* 106 N.W. 1074, 1076 (Wisc. 1906).

An attorney has a greater interest in these quasi-criminal proceedings than simply that of a potential adverse money judgment. The public has a definite interest in the question of whether an attorney has committed an act of wrongdoing. Most importantly, the function of the procedural process is to minimize the risk of erroneous decisions, a value that society, attorneys, and courts should consider heavily before determining that an attorney has intentionally committed a fraudulent act.

Even looking at the evidence in the light most favorable to the Alaska Bar Association this case is extremely close, indeed as close as a case can be. Peter Walton maintains his innocence of any wrongdoing. The only testimony presented against him was that of Child's attorney as to what was in the amended complaint. When a question was first raised about Exhibit "B"'s genuineness its origin was explained fully by Walton. There was no direct evidence relating to his intent. The only evidence was circumstantial, was introduced by Walton

himself, and was as exculpatory as it was accusatory. The amended complaint and exhibits were prepared with the knowledge of many persons. If there was indeed an attempt to fabricate evidence, maintenance of such an attempt would have required the perjury of at least another attorney and virtually the entire directorate and officers of the Aleut Corporation.

In the case of *In Re Hanson*, 532 P.2d 303, 308 (Alaska 1975) the Supreme Court of Alaska held that the clear and convincing standard should apply in judicial disciplinary proceedings. No less a test should be applied in attorney disciplinary proceedings.

In *Hanson* the Alaska Supreme Court cited the Supreme Court of Texas in the matter of *In Re Laughlin:*

> The serious nature of the proceeding depriving one of a public office...ought at the very least to require proof by clear and convincing evidence.
>
> 265 S.W.2d at 809.

The same argument is appropriate to attorneys. The same quantum of evidence should apply to judges and lawyers because the same basic issues are involved. To do less denies attorneys the equal protection of the law.

The Alaska dissenters noted that thirty-one states and the District of Columbia require the clear and convincing standard. Dissent n. 3. The National Center for Professional Responsibilities, *Professional Discipline for Lawyers and Judges (1979)*, recommends in Sec. 8.40 that "[f]ormal charges should be established by clear and convincing evidence." This is also the position of the American Bar Association.

The Supreme Court of Florida appropriately noted in *Florida Bar v. Quick*, 279 So.2d 4, 8-9 (Fla. 1973):

> It is necessary to bear in mind, however, that disciplinary actions, while not fully criminal in character, are penal proceedings the results of which may permanently cripple an attorney's reputation and standing in the community.

> Thus, we adhere to the view we took in *The Florida Bar v. Rayman*, supra, that the quantum of proof necessary to sustain a referee's finding of guilty is something more than the mere "preponderance of the evidence" sufficient for a civil action. We have defined that quantum as "clear and convincing evidence", not as stringent a standard as that required in criminal cases, but most certainly more than the contradictory and inconclusive testimony adduced in the instant case.

Even if this Court were to find that only a preponderance of the evidence is necessary to find a violation of sections of the Code of Professionl Responsibility relating to conflicts of interest, charging of fees, and the like, it should nonetheless find that, when fraud is alleged, due process requires proof by clear and convincing evidence. That is the same quantum of evidence that would be required in a civil action to return a money judgement in favor of any aggrieved client. A disciplinary action should not require less proof.

Idaho is a state that is listed in the *State Disciplinary Enforcement Systems Structural Survey* as requiring proof only by a preponderance of the evidence. However, in a case where attorney fraud was alleged the Idaho Supreme Court determined that:

> The circumstantial evidence relied upon by the Disciplinary Committee to support its finding of fraudulent and deceitful conduct does not meet the requirement of proof by a "clear and undoubted preponderance of the evidence" in disciplinary proceedings.

In the Matter of J. May, 538 P.2d 787 (Idaho 1975) at 790, 791.

In *Santosky v. Kramer*, 455 U.S. 745, 755 (1982), this Court noted that "the degree of proof required in a particular type of proceeding 'is the kind of question which has been left to the judiciary to resolve'", holding that specified state procedures must meet the requirements of federal due process. Peter Walton asks this Court to resolve the appropriate standard of evidence for attorney discipline proceedings where

fraud is alleged consistent with federal due process. An attorney's interest in the continued practice of law is particularly important to both himself and the public and more substantial than the loss of money. *Addington v. Texas*, 441 U.S. 244, 245.

CONCLUSION

Peter Walton is innocent. He has been wrongly found guilty of intentional malfeasance by the use of a standard of proof constitutionally inappropriate to the circumstances of the charge, the stigma incurred, and the loss sustained. This Court should accordingly note probable jurisdiction.

Dated this thirtieth day of March, 1984, at Anchorage, Alaska.

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APPENDICES

APPENDIX I

NOTICE: This opinion is subject to formal correction before publication in the *Pacific Reporter*. Readers are requested to bring typographical or other formal errors to the attention of the Clerk of the Appellate Courts, 303 K Street, Anchorage, Alaska 99501, in order that corrections may be made prior to permanent publication.

THE SUPREME COURT FOR THE STATE OF ALASKA

In the Disciplinary Matter Involving:	)	
PETER B. WALTON,	)	File No. 6289
Respondent-Attorney	)	OPINION
	)	[No. 2734 — September 30, 1983]

Appeal from the Disciplinary Board of the Alaska Bar Association.

Appearances: Robert H. Wagstaff, Wagstaff, Middleton & Pope, Anchorage, for Respondent. John R. Lohff, Lohff and Van Goor, Anchorage, for Alaska Bar Association.

Before: Burk, Chief Justice, Rabinowitz, Mathews, and Compton, Justices, and Carpeneti,* Superior Court Judge. (Moore, Justice, not participant.)

PER CURIAM

RABINOWITZ, Justice, with whom MATTHEWS, Justice, joins, dissenting.

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*Carpeneti, Superior Court Judge, sitting by assignment made pursuant to Article IV, Section 16, of the Constitution of Alaska.

This is a disciplinary matter involving attorney Peter B. Walton. Walton allegedly "created" a document, a copy of which he later attached, as an exhibit, to an unverified complaint. This action resulted in the Alaska Bar Association [ABA] initiating disciplinary proceedings against him. The Disciplinary Board[1] of the ABA recommended that Walton be suspended from the practice of law for eighteen months.[2] Walton contends that he has been denied due process of the law and that the evidence does not support a finding of any wrongdoing.

Walton "created" the document while representing the Aleut Corporation in civil litigation against L. William Childs. Childs has been Aleut's chief executive officer from 1972 until mid-1975, when his relationship with the corporation's board of directors and officers deteriorated. When Childs left Aleut, there was disagreement as to Aleut's obligations under its employment contract with Childs. Aleut filed a declaratory judgment action against Childs to resolve the uncertainty.

In early March, 1978, Frank Cowden, Aleut's vice-president and director for litigation, reviewed all of Aleut's outstanding loans. He discovered a March 2, 1973, promissory note, executed by Childs in favor of Aleut for $13,000. The promissory note stated that it was secured by a deed of trust on a specified parcel of real estate. Unable to find a copy of the deed of trust in the corporation's records, Cowden went to the Recorder's Office and obtained a copy of the recorded deed. Although the promissory note referred to a deed of trust, the one found at the Recorder's Office was labelled a *second* deed of trust and contained a subordination clause. The deed of trust was signed by Childs and notarized on March 2, 1973. The subordination clause stated that the deed was subordinate to another deed of trust held by Alaska Mutual Savings Bank, which secured a $47,000 loan to Childs executed on March

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[1] In disciplinary matters, the Board of Governors of the Alaska Bar Association is referred to as the "Disciplinary Board." Rule II-13(a), Alaska Bar R.

[2] The Board's findings and recommendations are attached hereto as Appendix "A."

5, 1973, and was recorded on March 6, 1973. Thus, on its face, the deed of trust in favor of Aleut appeared to have been altered, by adding the subordination clause after Childs had signed it. In addition, Childs had not recorded the deed until October 6, 1973.

In mid-March 1978, Walton filed a second lawsuit on Aleut's behalf against Childs [Childs II], alleging that the $13,000 loan was illegal. Childs moved to dismiss the complaint. However, so that scheduled depositions could be completed, the parties stipulated that Aleut's opposition to that motion did not have to be filed until April 25, 1978.

Childs' deposition began on April 13, 1978. He testified that the $13,000 loan was made pursuant to an understanding that Aleut would furnish the down payment that Childs needed to purchase a home in Anchorage, in consideration for his moving to Alaska to work for the corporation. He stated that he had signed the promissory note March 2, 1972, and that he had executed and delivered a copy of the deed of trust to Aleut on the same date. He further testified that the deed of trust had not been altered after he signed it. On April 21, 1978, Childs' depostion was resumed. Before any questioning began, Childs stated that he wanted to change his earlier statement that the deed of trust had not been altered. He admitted that it had and that he knew of this prior to having it recorded.

On April 25, 1975, Aleut, through Walton, filed an amended complaint in Childs II alleging that Childs had defrauded the corporation in obtaining the $13,000 loan. Paragraph 4 of the complaint stated:

> 4. Accordingly, on 2 March, 1973, for the purpose of financing a down payment in connection with the purchase of a home in Anchorage, Alaska, defendants obtained funds from the plaintiff totaling $13,000, repayment of which they professed would be made according to the terms of a Promissory Note attached hereto marked Exhibit A. At the same time, defendants executed a Deed of Trust for the benefit of the plaintiff Corporation and delivered a copy thereof to the president and secretary of the plaintiff corporation. *A copy of that copy is attached hereto marked Exhibit B.*

> The original Deed of Trust was either retained by defendant L. William Childs or, at his discretion, was left with a legal secretary named Susan Abbott, then employed by attorneys for the plaintiff Corporation. On its face, the original Deed of Trust *(of which a copy is attached marked Exhibit B)* appeared to be a first Deed of Trust, not secondary to any other lien on the subject property.
>
> Either by express representations or by his silence, defendant L. William Childs represented to plaintiff and/or led the plaintiff to reasonably believe that the said Deed of Trust, *Exhibit B,* was a first Deed of Trust and not subordinate to any other lien on the subject property. In fact, however, defendant did not own the real property in which he purporated to grant plaintiff a security interest in the form of a Deed of Trust. (Emphasis added).

In Paragraph 8, the amended complaint alleged that Childs later materially altered the original deed of trust by adding the word "Second" to the top of the document and by adding the subordination clause. The complaint referred to this allegedly altered deed as Exhibit D.

Although the references to Exhibit B in Paragraph 4 suggested that the original deed of trust is a copy (or a copy of a copy) of an exisiting document signed by Childs,[3] that was not in fact the case. As stated in the opening brief submitted by Walton to this court:

> Walton created illustrative Exhibit "B" by making a xerox copy of the deed of trust as altered and recorded by Childs. Using this copy, Walton then blanked out what he believed to be those provisions that had been wrongfully added to the instrument after its execution.

The blanked out parts consisted of: "(1) recording data; (2) the word '*Second*'; (3) the subordination clause; (4) and the recording information on p. 2 (reverse side) of the Deed of

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[3] Similar references to Exhibit B are also made in paragraphs 5, 8 and 12 in the amended complaint.

trust..." Walton "created" this document on April 14, 1978, the day after Childs stated in his deposition that the deed had not been altered, but before Childs later corrected his earlier statement.

The amended complaint was served on Childs' attorney, Hugh G. Wade, on April 25, 1978. Although Walton believed that filing the amended complaint rendered the motion to dismiss moot, he filed an opposition to the motion in which the deed of trust he "created" was referred to[4] and attached thereto as Exhibit K.

Wade eventually discovered through depositions that Exhibit B was a reconstruction of the deed of trust, and filed a motion for sanction in the superior court. The superior court dismissed the amended complaint in Childs II without prejudice, and referred the matter to the district attorney for possible criminal prosecution under AS 11.30.300 (Preparing False Evidence)[5] and to the ABA for possible disciplinary action.

On August 5, 1980, the State Bar Disciplinary Administrator, pursuant to Bar Rule II-15(e), filed a Petition for Formal Hearing with the Disciplinary Board. That petition alleged that Walton's use of Exhibit B in the amended complaint filed in Childs II violated: (1) DR 1-1]2(A) (4) (engaging in conduct involving dishonesty, fraud, deceit or misrepresentation); (2) DR 1-102(A) (5) (engaging in conduct prejudicial to the administration of justice); (3) DR 7-102(A) (1) (asserting a position that will obviously serve merely to harass or maliciously injure another); (4) DR 7-102(A) (3) (concealing or knowingly failing to disclose that which by law is required to be disclosed); (5) DR 7-102(A) (6) (participating in the creation of evidence that is obviously false); (6) DR 7-106(C)

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[4] *See* Memorandum In Opposition To Defendents' Motion to Dismiss, p. 3, 4, 9. It bears noting that the ABA's Petition For Formal Hearing alleges only that Walton should be disciplined for his conduct in connection with the amended complaint (i.e., Exhibit B), and makes no mention of the opposition memorandum filed by Walton (i.e., Exhibit K).

[5] Walton was indicted for violating AS 11.30.300, but the indictment was subsequently dismissed because of numerous improperties that occurred during the grand jury proceedings.

(1) (alluding to a matter that has no reasonable basis of support in relevant admissible evidence); and (7) Alaska Bar Rule II-9 (obstructing the administation of justice).

On October 7, 1980, Walton filed his Response to Petition for Formal Hearing. Although in effect admitting that he had created Exhibit B, Walton denied that it was ever intended or represented to be "a true and correct copy of an existing document." He further denied that his conduct was unethical or that he had violated any disciplinary rule.

On August 5 and 6, 1981, a hearing was held by a Hearing Committee pursuant to Bar Rule II-15(f). In its Report, the Hearing Committee concluded that Walton had violated DR 1-102(A) (4) (intentional misrepresentation), DR 1-102(A) (5) (engaging in conduct prejudicial to the administration of justice) and DR 7-102(A) (1) (asserting a position where it is obvious that such would serve merely to harass the opposing party). The Committee's recommended discipline was to publicly censure Walton.

After learning of the contents of the Hearing Committee's Report, counsel for Walton and for the ABA agreed not to appeal the findings and recommendations to the Disciplinary Board. They further agreed to waive the submission of briefs and oral argument.

On August 28, 1981, the disciplinary Board issued its Findings of Fact and Recommendations. The Board's findings differed from those of the Hearing Committee. First, in addition to the violations found by the Hearing Committee, the Board found that Walton violated DR 7-102(A) (3) (concealing or knowingly failing to reveal what Walton was legally required to disclose), DR 7-102(A) (6) (participating in the creating of obviously false evidence), DR 7-106(C) (1) (stating a matter before the tribunal that Walton had no reasonable basis to believe was supported by admissible evidence) and Bar Rule II-9 (obstructing the administration of justice). Second, the Board recommended suspending Walton from the practice of law for eighteen months and that he reimburse the ABA for reasonable costs and attorney's fees, pursuant to Bar Rule II-15(j).

On September 8, 1981, Walton moved that the board

reconsider its findings and recommendations. The motion was denied and the matter is now before this court.

I. DUE PROCESS CLAIMS

We have previously stated that when an attorney is "subject to suspension or disbarment, the disciplinary proceedings must conform to the requirements of due process under both the federal and Alaska constitutions." *In re Robson*, 575 P.2d 771, 773-4 (Alaska 1978). Walton contends that he has been denied due process in a number or respects. We will address these assertions individually.

A. COMMMINGLING OF FUNCTIONS BY RULE AND PRACTICE

The due process clauses of both the federal and Alaska constitutions require that a disciplinary hearing be conducted before an impartial tribunal. *McGinnis v. Stevens*, 543 P.2d 1221, 1228 (Alaska 1975). Walton first argues that the Alaska Bar Rules allocate responsibility in disciplinary matters in such a way that there is an impermissible commingling of prosecutorial and adjudicatory functions. Rule II-13(c) provides:

> The Board shall have the power and duty:
>
> (1) To appoint a State Bar Disciplinary Administrator (hereinafter referred to as "Administator").
>
> (2) To supervise the investigation of all complaints against lawyers and to supervise the Administrator and his or her staff.
>
> (3) To retain legal counsel.
>
> (4) To hear appeals from the recommendations of Hearing Committees, and to modify the findings of fact, conclusions of law or proposed orders of Hearing Committees, regardless of whether there has been an appeal to the Board, and without regard to the discipline recommended by the Hearing Committee.

Rule II-14(a) states that the Administrator serves at the pleasure of the Board, and further provides that the Administrator shall:

(7) In his discretion, prosecute complaints and appeals...

...

(10) Keep the Board fully informed about the progress of all matters in his charge.

(11) Perform other duties set forth herein or assigned by the Board.

According to Walton, the above rules make the Board in effect both prosecutor and judge, which, he claims, is unconstitutional.

Due process requires some separation between those persons prosecuting the complaint and those adjudicating it; the prosecutor, who has a "probable partiality," should not be in a position to influence the decision makers. *In re Robson*, 575 P.2d 771, 774 (Alaska 1978). There may, however, be some combination of these functions within a particular agency. In *In Re Cornelius*, 520 P.2d 76, 83-4 (Alaska 1974), we stated:

> There is...no merit to the claim that the combination of functions of the state bar attorney, alleged to be that of complainant, prosecutor and adjudicator, violated due process or AS 44.62.630. The combination of investigative and judicial functions within an agency does not violate due process; a board may make preliminary factual inquiry on its own in order to determine if charges should be filed.

Similarly, in *In re Hanson*, 532 P.2d 303, 306 (Alaska 1975), we held that the rules of the Commission on Judicial Qualifications, which allowed the Commission both to conduct a preliminary investigation and to adjudicate facts, did not violate due process. In light of these precedents, we are not persuaded that the alocation of responsibility under the aforementioned sections of Rule II-13 and Rule II-14 violate due process.

This does not mean that proceedings conducted pursuant to the above Rules are immune from constitutional attack. In *In re Robson*, 575 P.2d 771 (Alaska 1978), we held that the presence of Bar Counsel during the Disciplinary Board's deliberations violated the respondent's due process rights, even

though Bar Counsel had not participated in the actual prosectuion of the case before the hearing committee, or taken an active part in the Board's deliberations. *Id.* at 773-75.

Walton's claim of impropriety in the instant case is directed at the role played by Karen Hunt, the ABA's then President.[6] Bar Rule II-15(a) states that the President shall select members of Hearing Committees, subject to the Board's ratification. In addition, as a member of the Board of Governors, the President is a member of the Disciplinary Board. Bar Rule II-13(a). Hunt, among other things, acknowledged receipt of Walton's Motion for Reconsideration of the Board's findings and recommendations, and denied Walton's Motion for Continuance, an action that was later ratified by the Board. Walton is correct that Hunt's performance of these administrative duties aligned her with the adjudicatory arm of the ABA. The only alleged commingling of roles by Hunt, however, is based on the assertion that she once intended to represent the ABA in the proceedings before this court.

Apparently because it was suggested by Walton that her representation of the ABA might pose a conflict of interest, Hunt never appeared on behalf of the ABA. The ABA was represented before this court by John R. Lohff, a private practitioner acting as Bar Counsel. While it may have been poor judgment for Hunt to have even considered representing the ABA before this court, we do not think that her having done so was sufficient to taint the proceedings. Her action certainly falls fail short of the impropriety that was held to violate due process in *In re Robson,* 575 P.2d at 773-775. Accordingly, Walton's due process argument, based upon commingling of functions, failed.

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[6] Walton briefly indicates that there is an "internal record memorandum file" available to the attorney prosecuting the disciplinary matter, the Bar Association and the Board, but not available to him. Walton's request for access to the file was denied apparently on the grounds that it was privileged work product and because the Bar Rules do not provide for such disclosure. Since the record fails to demonstrate that any member of the Board had access to the file, we elect not to consider this issue.

B. NON-APPEARANCE BEFORE THE BOARD

Walton contends that the board's departure from the Hearing Committee's findings and recommendations without calling for briefs or oral argument denied him due process. The Bar Rules expressly afforded Walton the right to submit briefs to the Board and to appear before it for oral argument. Bar Rule II-15(i). Walton chose not to, however, and instead, with counsel for the ABA, waived appeal to the Board as well as oral argument and submission of briefs. Bar Rule II-13(c)(4) confers upon the Board the power and duty

> to modify the findings of fact, conclusions of law or proposed orders of Hearing Committees, regardless of whether there was an appeal to the Board, and without regard to the discipline recommended by the Hearing Committee.

We believe that the Rules clearly afforded Walton an opportunity to be heard by the Board. Furthermore, since Walton was on notice that the Board might depart from the Hearing Committee's findings and recommendations, whether or not there was an appeal, Walton waived his right to be heard, by entering into the stipulation.

C. MEMBERSHIP OF BOARD

Before these disciplinary proceedings were initiated, the district attorney sought an indictment against Walton for the same conduct at issue here. The indictment was dismissed because of improprieties occurring before the grand jury. No further indictment was sought. At the time the District Attorney's Office was prosecuting Walton, Elizabeth Kennedy, one of the members of the Disciplinary Board, was employed by the Department of Law in the civil section of the Attorney General's Office. Walton claims that the Disciplinary Board was, therefore, improperly constituted.

In support of his argument, Walton cites Canon 3C(1)(b) of the Code of Judicial Conduct, which states that a judge should recuse himself when "a lawyer with whom he previously practiced law served during such association as a lawyer concerning the matter." However, even if the code of Judicial Conduct applies to members of the Disciplinary Board, we

do not believe that the entire Department of Law should be considered one law office, or that all attorneys employed thereby should be considered to be practicing law together for purposes of Canon 3C(1) (b). Although within the same department, the Attorney General's Office and the District Attorney's Office operate separately, and there is no indication that Kennedy had any part in the prosecution of Walton. Thus, the disciplinary Board was not improperly constituted. *Cf. Keel v. State,* 552 P.2d 155 (Alaska 1976) (former assistant district attorney not disqualified from acting as judge in a criminal action).

D. STANDARD OF PROOF

According to Walton, the required standard of proof in this case is proof by "clear and convincing evidence." Proof by a mere preponderance, he argues, amounts to a denial of due process of law.

Alaska Bar Rule II-15(f) provides, partly: "The Administrator shall have the burden...of demonstrating by the preponderance of the evidence that the Respondent has, by act, or omission, committed an offense..." The use of this standard in bar disciplinary matters was approved by this court in *In re Robson,* 575 P.2d 771, 776-77 (Alaska 1978). Although the respondent in *Robson,* unlike Walton, did not argue that use of the preponderance standard violated his right to due process, Walton's argument in the present case fails to persuade us that he is entitled to be judged by a different standard.

Walton cites no authority holding that proof by clear and convincing evidence is required as a matter of federal due process, and we have found none.[7] Nor does the authority that

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[7] Walton's argument fails to make clear whether he relies upon the due process guaranteed by the Alaska Constitution or that contained in the Constitution of the United States. The two guarantees are not necessarily the same. South Dakota v. Neville, 74 L.Ed.2d 748 (1983).

he cites persuade us that such is required under the state constitution.[8]

II. FABRICATION OF FALSE EVIDENCE

Walton contends that, as a matter of law, he did not create false evidence in violation of DR 7-102(A) (6), since, according to Walton, an unverified complaint is not evidence. The Bar Association contends that the term "evidence," in this context, should not be limited to its technical meaning under the Rules of Evidence. According to the ABA, DR 7-102(A) (6) should apply to any false document concerning a critical aspect of an ongoing lawsuit, produced by manipulations outside the courtroom.

Like the ABA, we believe that the term "evidence," in this context, was meant to apply to a broader category of items than those admissible at trial under the technical requirements of the Rules of Evidence. Documents attached to pleadings, although not always admissible evidence, are often relied upon by the court and counsel in matters of importance. Opposing counsel, for example, upon seeing a document such as the one in the case at bar, might well conclude that his client's position was untenable and so advise him, despite the fact that the document was fabricated. The danger is that others will be misled, to their detriment, with a potential for harm as great as if the item had been admissible at trial.

III. EVIDENCE OF WRONGDOING

Where, as here, findings of fact entered by the Disciplinary Board are challenged in this court, "the respondent attorney

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[8] In re Hanson, 532 P.2d 303, 308 (Alaska 1975), held that proof by clear and convincing evidence is required in disciplinary proceedings against a judge, for alleged violations of the code of Judicial Conduct. Today's decision affirms a lesser standard of proof in attorney discipline cases. *Hanson*, however, was not based on due process grounds. Also, in *Hanson* the applicable statutes and rules contained *no* prescribed standard. *Id.* at 307. Here, there is a prescribed standard: proof by a preponderance of the evidence. Rule II-15(f), Alaska Bar R.

In light of today's ruling, we may be required to reevaluate our holding in *Hanson* if and when we are presented with another case involving disciplinary proceedings against a judge.

bears the burden of proof in demonstrating that such findings are erroneous." *In re Simpson,* 645 P.2d 1223, 1227 (Alaska 1982). And

> [t]hough this court has the authority, if not the obligation, to independently review the entire record in disciplinary proceedings, findings of fact made by the board are nonetheless entitled to great weight. The deference owed to such findings derives from the responsibility to conduct disciplinary proceedings which this court has delegated to the Bar Association.

Id. at 1226-1227.

Upon review of the entire record, we conclude that the findings of the Board, in all material respects, are supported by the evidence. The findings and recommendations of the Board are AFFIRMED. Respondent Peter B. Walton is ordered suspended from the practice of law for a period of eighteen months, effective 30 days after the publication date of our opinion. Respondent is ordered to comply with the requirements of Rule II-26, Alaska Bar Rules.

BEFORE THE DISCIPLINARY BOARD

ALASKA BAR ASSOCIATION

In the Disciplinary Matter)
Involving:)
)
PETER B. WALTON,)
)
Respondent-Attorney)
)

No. 78-13

FINDINGS OF FACT AND RECOMMENDTIONS
OF THE DISCIPLINARY BOARD
OF THE
ALASKA BAR ASSOCIATION

Based on the evidence received the Board makes the following findings:

1. Respondent PETER B. WALTON is, and at all times relevant to this proceeding has been, an attorney at law admitted to practice in the State of Alaska and a member of the Alaska Bar Association.

2. During an extended period, which included the period of April and May of 1978, the Respondent represented the Aleut Corporation in litigation against L. William Childs and Patricia A. Childs.

3. On April 14 and April 15 of 1978, in the manner described more fully below, the Respondent prepared a document which appeared to be a photocopy of a Deed of Trust executed on March 2, 1973, by L. William Childs and Patricia A. Childs as Trustors to Alaska Title Guaranty Company as Trustee for the benefit of the Aleut Corporation.

4. The document referenced in Finding 3 above was prepared by utilizing a photocopy of a Second Deed of Trust of the same date from which the Respondent deleted, by means of "white-out" or some other white obliterating liquid, the word "Second" from above the caption "Deed of Trust," a subordination provision reflecting that the Deed of Trust was second and subordinated to a Deed of Trust executed for the benefit of Alaska Mutual Savings Bank and all recording data, including graphite marks utilized by the recording office to highlight the seal of the notary public.

5. Preparation of the document reflected extreme care in the utilization of the whiting material, particularly in the vicinity of the notary seal, and in photocopying so that the alterations were not detectable.

6. Respondent attached the fabricated document which appeared to be photocopy of an actual First Deed of Trust as Exhibit B to an "Amended Complaint" and as Exhibit K to a "Memorandum in Opposition of Defendant's Motion to Dismiss or Motion for Summary Judgetment" prepared in conjunction with services rendered by the Respondent in the *Aleut Corporation v. Childs* cases.

7. In the text of the Amended Complaint, the document prepared by the Respondent and attached as Exhibit B was

described first as a "copy of that copy" of "the original Deed of Trust." Exhibit B was referenced numerous times in the Amended Complaint and none of the references was made with ambiguous language that could be construed to advise that the exhibit was a document created for illustrative purposes.

8. The memorandum to which the fabricated document was attached as Exhibit K referred to that exhibit three times, none of which references was in an ambiguous form that might be construed to advise that the document was recreated for illustrative purposes.[1]

9. Following preparation of the fabricated Deed of Trust and its attachment to the referenced pleadings, those pleadings were reviewed by Lee Holen, a law clerk performing services in the Respondent's offices on a contract basis, and after such review Ms. Holen expressed her concern to the Respondent that his description of the document might be misunderstood. That expression of concern was "brushed off" by the Respondent.

10. On April 25, 1978, copies of the pleadings to which the fabricated Deed of Trust was attached were served upon Hugh Gerald Wade, attorney for L. William Childs, after hours after by taxi to his home. The original pleadings were not filed with the court until May 4, 1978.

11. During the deposition of Frank Cowden, Vice President for the Aleut Corporation, on May 5, 1978, Cowden was asked by Child's attorney on direct examiniation if he had brought with him any document in compliance with a subpoena. Cowden produced the fabricated Deed of Trust with a communication from Respondent attached to it. This memorandum, prepared April 14, 1978, was produced with

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[1] The Area Hearing Committee determined as follows:

> The Petition did not assert that the Respondent committed misconduct arising from submission of Exhibit K to the motion and the Area Hearing Committee took no action in that regard. The Committee determined, nevertheless, that utilization of the re-created document in conjunction with the Memorandum in Opposition to the Motion to Dismiss is properly considered as bearing upon the Respondent's intent.

The Board concurs with this determination.

an express waiver of the attorney-client privilege, despite opposing Counsel's statement that it need not be produced. It read:

> Dear Frank: Guess what? Here's the smoking gun. Either Childs falsely testified when he said he gave Lily a copy of his deed of trust on March 2nd, or he falsely testified when he said it hadn't been altered after executed it [sic]. But in that case he will have difficulty explaining why he concealed the fact of its alteration. Cheers, Peter Walton.

Nowhere in the memorandum does Respondent refer to the document as a fabrication.

12. During the deposition of Frank Cowden, Vice President for the Aleut Corporation, on May 5, 1978, following evasive testimony on direct examination which made it appear that the fabricated Deed of Trust attched as a copy of the pleadings was or may have been a copy of an actual Deed of Trust in the possession of the Aleut Corporation or the Respondent, the Respondent, through leading questions on cross-examination, elicited testimony to establish that the Deed of Trust attached as Exhibit B to the Amended Complaint and as Exhibit K to the memorandum was fabricated by the Respondent. At no time prior to this cross-examination did Respondent reveal by any oral or written communication that the "copy" of the Deed of Trust attached as an exhibit to various pleadings filed with the Court and delivered to opposing Counsel was, in fact, a fabricated document.

13. Respondent intended that the fabricated document attached to the Amended Complaint as Exhibit B would be understood to be a copy of an existing photocopy of an actual Deed of Trust. This finding is based upon the care exercised by Respondent in the preparation of the fabricated Deed of Trust, the precise nature of the references in the pleadings referring to the exhibit, the repeated references in the Amended Complaint and the Memorandum in Opposition to the Motion to Dismiss, Respondent's decision to ignore the warnings of a colleague regarding the possible misinterpretation of the references to the document, the text of the "smoking gun"

memorandum, Respondent's failure to notify opposing counsel or the court that the document was a fabrication, the findings set forth above and the record herein.

14. The document attached as Exhibit B to the Amended Complaint and Exhibit K to the Memorandum in Opposition to a Motion to Dismiss was not in the nature of an illustrative exhibit designed to demonstrate to the court or opposing counsel the Respondent's interpretation of the evidence or a theory of Respondent's that was supportable by evidence.

Based on the above findings the Board recommends the following:

CONCLUSIONS

1. Respondent violated Disciplinary Rule 1-102(A) (4) of the Code of Professional Responsibility by engaging in conduct involving intentional misrepresentation in that he intentionally misrepresented in pleadings served on opposing counsel and filed with the court that a document attached as an exhibit was a copy of an actual Deed of Trust when in fact it was fabricated by the Respondent.

2. Respondent violated Disciplinary Rule 1-102(A) (5) of the Code of Professional Responsibility by engaging in conduct prejudicial to the administration of justice.

3. Respondent violated Disiplinary Rule 7-102(A) (1) of the Code of Professional Responsibility by asserting a position (i.e., that a copy of an existing copy of an actual Deed of Trust was attached as an exhibit), when it was obvious that such action would serve merely to harrass the opposing party.

4. Respondent violated Disciplinary Rule 7-102(A) (3) of the Code of Professional Responsibility by concealing or knowingly failing to disclose that which he is required by law to reveal.

5. Respondent violated Disciplinary Rule 7-102(A) (6) of the Code of Professional Responsibility of participating in the creation of evidence when it was obvious that the evidence was false.[2]

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[2] The Board does not consider the actual submission or admissibility of evidence as determinative of this issue. For example, a violation would occur if a lawyer impressed a murder victim's fingerprints on a gun, left the gun at the murder scene, departed and thereafter took no active role.

6. Respondent violated Disciplinary Rule 7-106(C) (1) of the Code or Professional Responsibility by stating a matter before a tribunal that he had no reasonable basis to believe was supported by admissible evidence.[3]

7. Respondent violated Alaska Bar Rule II-9.

RECOMMENDED DISCIPLINE

It is the recommendation of the Disciplinary Board that Respondent be suspended from the practice of law pursuant to Alaska Bar Rule II-12(b) for a period of eighteen months.

The recommendation of the Board is based upon the serious nature of Respondent's misconduct and not upon the number of disciplinary rules his conduct violated. It is the further recommendation of the Board that the court order that Respondent reimburse the Association for reasonable costs and attorney fees incurred herein pursuant to Bar Rule II-15(j) based upon the statement of costs and attorney fees submitted herewith.

RESPECTFULLY SUBMITTED by the Disciplinary Board of the Alaska Bar Association this 28th day of August, 1981.

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[3] The Board concludes that an appearance before a tribunal may be in written as well as verbal form.

Andrew J. Kleinfeld
Chairman

Richard D. Savell
Recorder

Harold M. Brown

Mary K. Hughes

Elizabeth Page Kennedy

William B. Rozell

RABINOWITZ, Justice joined by MATTHEWS, Justice, dissenting.

I dissent from the majority's rejection of Walton's due process claim as it relates to the applicable burden of proof in bar disciplinary matters. I further dissent from the majority's affirmance of the disciplinary Board's findings of fact regarding Walton's alleged violation of the various Disciplinary Rules involved in this proceeding. Employing a clear and convincing burden of proof, my review of the record persuades me that the Bar has only demonstrated that Walton's conduct was both negligent and grossly negligent, thus violative of DR 1-102(A) (5) and (6). I would therefore impose the sanction of a public censure.

I. WHETHER THE "PREPONDERANCE OF THE EVIDENCE" STANDARD IS VIOLATIVE OF DUE PROCESS UNDER THE ALASKA CONSTITUTION.

Walton's position is that the use of a preponderance of the evidence standard called for by Alaska Bar rule II-15 violates due process under Alaska's Constitution in disciplinary proceedings, particularly in those proceedings in which fraudulent conduct is charged. In my view, the United States Supreme Court's decision in *Santosky v. Kramer*, 455 U.S. 745, 71 L.Ed.2d 599 (1982) furnishes persuasive support for Walton's position. In *Santosky*, the Court was called upon to determine whether the "preponderance of the evidence" or "clear and convincing" standard should be applied in parental rights termination proceedings. Applying the three factors enunciated in *Mathews v. Eldridge*, 424 U.S. 319, 335, 47 L.Ed.2d 18, 33 (1976), which governs a determination of what process is due under the Fourteenth Amendment in any given

fact situation,[1] the *Santosky* court concluded that the first factor, the importance of the individual interests at stake, dictated that a clear and convincing standard be applied:

> This Court has mandated an intermediate standard of proof — "clear and convincing evidence" — when the individual interests at stake in the state proceeding are both "particularly important" and "more substantial than mere loss of money." *Addington v. Texas,* 441 U.S., at 424, 60 L.Ed.2d 323, 99 S.Ct. 1804. Notwithstanding "the state's 'civil labels and good intentions,'" *id.,* at 427, 60 L.Ed.2d 323, 99 S.Ct. 1804, quoting *In Re Winship,* 397 U.S. at 365-366, 25 L.Ed.2d 368, 90 S.Ct. 1068, 51 Ohio Ops. 2d 323, the Court has deemed this level of certainty necessary to preserve fundamental fairness in a variety of government-initiated proceedings that threaten the individual involved with a "a significant deprivation of liberty" or "stigma." 441 U.S., at 425, 426, 60 L.Ed.2d 323, 99 S.Ct 1804. *See e.g., Addington v. Texas, supra,* (civil commitment); *Woodby v. INS,* 385 U.S. at 285, 17 L.Ed.2d 362, 87 S.Ct. 483 (deportation); *Chaunt v. United States,* 364 U.S. 350, 353, L.Ed.2d 120, 81 S.Ct. 147 (1960) (denaturalization); *Schneiderman v. United States,* 320 U.S. 118, 125, 159, 87 L.Ed. 1796, 63 S.Ct. 1333 (1943) (denaturalization).

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[1] The *Eldridge* court observed:

> [I]dentification of the specific dictates of due process generally requires consideration of three distinct factors: first, the private interest that will be affected by the official action; second, the risk of an erroneous deprivation of such interest through the procedures used, and the probable value, if any, of additional or substitute procedural safeguards; and finally, the Government's interest, including the function involved and the fiscal and administrative burdens that the additional or substitute procedural requirement would entail.
>
> 424 U.S. at 335, 47 L.Ed.2d at 33.

455 U.S. 745, 71 L.Ed.2d 599 at 608-09. I think it apparent that the individual interests at stake in a bar disciplinary proceeding are "particularly important and more substantial that the mere loss of money" to the attorney involved. The proceedings stigmatize the attorney and threaten him with a significant deprivation of liberty.

The second *Eldrige* factor, whether the Bar Rule's chosen standard creates a risk of error, again weighs in favor of adopting the clear and convincing evidence standard. This is evidenced by the facts of the instant case. If Walton is indeed innocent of the allegations made against him, the risk of wrongful discipline would be significantly reduced by using the clear and convincing evidence standard.

Concerning the third *Eldridge* factor, it is clear that the state has an interest in protecting society from attorneys who have violated bar disciplinary rules.[2] The Supreme Court has characterized the preponderance of the evidence standard as placing the risk of error equally upon the parties. When adopting the clear and convincing evidence standard in *Addington v. Texas*, 441 U.S. 418, 427, 60 L.Ed.2d 323 (1978), the Supreme Court stated "[t]he individual should not be asked to share equally with society the risk of error when the possible injury to the individual is significantly greater than any possible harm to the state." The dispositive inquiry thus becomes whether the potential injury to the attorney from an incorrect

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[2] A principal purpose of attorney disciplinary proceedings is protection of the public and maintenance of the integrity of the judicial system. *See*, In re Kleindeist, 644, P.2d 249, 256 (Arz. 1982) (en banc) ("[d]iscipline against an attorney has two purposes: (1) to protect the public from unethical attorneys; and (2) to deter other attorneys from engaging in unethical conduct"); District of Columbia Bar v. Kleindeinst, 345 A.2d 146, 148 (D.C. App. 1975) (per curiam) (a purpose of disciplinary action is partly to maintain integrity of profession in eyes of public); State v. Scott, 639 P.2d 1131, 1134 (Kan. 1982) (per curiam) ("disciplinary proceedings...are a species unto themselves which cannot be characterized as either a civil action or a criminal proceeding...Although the errant attorney may receive punishment, the purpose of these proceedings is primarily for the protection of the courts, the legal profession, and the general public from those who have been lacking in professional responsibility.").

determination of a violation of the disciplinary rules is "significantly greater" than the possible harm to the state caused by: (1) an incorrect determination that an attorney has not violated the rules, and (2) the increased burden on the state of meeting the higher standard of proof. In my view, the potential injury to the attorney is significantly greater, and therefore I would hold that due process under Alaska's Constitution requires the use of the clear and convincing standard rather than the preponderance of the evidence standard.[3]

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[3] Thirty-one states and the District of Columbia use the clear and convincing standard. *See*, for example:

Alabama	Hunt v. Disciplinary Board of Alabama State Bar, 381, So.2d 52 (Ala 1980).
Arizonza	Matter of Rubi, 652 P.2d 1014 (Ariz. 1982).
California	Price v. State Bar of California, 638 P.2d 1311 (Cal. 1982) ("convincing proof to a reasonable certainty").
Colorado	People v. Howard, 364 P.2d 380, (Colo. 1961) ("Substantial, clear, convincing and satisfactory").
Delaware	In re Morford, 80 A.2d 429 (Del. 1951).
D.C.	Matter of Thorup, 432 A.2d 1221 (D.C. 1981).
Florida	The Florida Bar v. Ragano, 403 So.2d 401 (Fla. 1981).
Hawaii	Disciplinary Board of Hawaii Supreme Court v. Kim, 583, P.2d 333, (Ha. 1978) ("and beyond reasonable doubt").
Illinois	In re Jafree, 444 N.E.2d 143 (Ill. 1982).
Iowa	Committee on Professional Ethics and Conduct of Iowa State Bar Association v. Thompson, 328, N.W.2d 520 (Iowa 1983) ("convincing preponderance").
Kansas	State v. Scott, 639 P.2d 1131 (Kan. 1982) ("substantial, clear, convincing and satisfactory").
Louisiana	Louisiana State Bar Association v. Mitchell, 375 So.2d 1350 (1979).
Maine	National Center for Professional Responsibility, State Disciplinary Enforcement Systems Structural Survey 61 (1980).
Maryland	Attorney Grievance Commission of Maryland v. Kerpelman, 438 A.2d 501 (Md. 1981).
Minnesota	In re Gillard, 271 N.W.2d 785 (Minn. 1978).
Mississippi	Netterville v. Mississippi State Bar, 397 So.2d 878 (Miss. 1981).
Montana	Matter of Goldman, 588 P.2d 964 (Mont. 1978) (attorney has burden "to show that charges are not sustained by convincing proof and to a reasonable certainty").
Nevada	Copren v. State Bar, 183 P.2d 833 (Nev. 1947).

II. EVIDENCE OF WRONGDOING

Review of the Disciplinary Board's findings, pursuant to the standards articulated in *In Re Simpson*, 645 P.2d 1223, 1227 (Alaska 1982), has convinced me that Walton did not intend to deceive. On the other hand, I conclude that the evidence in the record clearly and convincingly demonstrates that Walton's conduct was both negligent and grossly negligent. He should have known that the language used in the amended complaint — "a copy of a copy" — would be taken to mean

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New Hampshire	Edes' Case, 395 A.2d 498 (N.H. 1978).
New Jersey	In re Sears, 364 A.2d 777 (N.J. 1976).
New Mexico	In re Sedillo, 498 P.2d 1353 (N.M. 1972).
N. Carolina	Matter of Palmer, 252 S.E.2d 784 (1979).
North Dakota	Matter of Lovell, 292 N.W.2d 76 (N.D. 1980).
Oregon	In re Conduct of Paauwe, 654 P.2d 1117 (Ore. 1982).
Rhode Island	Carter v. Walsh, 406 A.2d 263 (R.I. 1979).
S. Carolina	In re Friday, 208 S.E.2ds 535 (S.C. 1974).
South Dakota	In re goodrich, 98 N.W.2d 125 (S.D. 1959).
Utah	In re McCullough, 95 P.2d 13 (Utah 1939) (convincing proof and fair preponderance").
Virginia	Tenth District Committee of Virginia State Bar v. Baum, 193 S.E.2d 698 (Va 1973).
W. Virginia	Committee on Legal Ethics of West Virginia State Bar v. Pence. 240 S.E.2d 668 (W. Va. 1977) ("full, clear, and preponderating evidence").
Wisconsin	Matter of Sedor, 245 N.W.2d 895 (Wis. 1976).
Wyoming	State Board of Law Examiners v. Goppert, 205 P.2d 124 (Wyo. 1949).

See also the Model Rules for Lawyer Disciplinary Enforcement, ABA Standing Committee on Professional Discipline and the National Center for Professional Responsibility (1979). Rule 17C of these model rules provides as follows:

> *Standard of Proof.* Formal charges of misconduct, petitions for reinstatement, and petitions for transfer to and from disability inactive status shall be established by clear and convincing evidence.

a photocopy. He thus violated DR1-102(A) (5) and (6).[4]

Given my conclusion that Walton did not intend that the fabricated document would be taken to be a photocopy of an existing document, it follows that Walton did not violate DR 1-102(A) (4) (intentional misrepresentation); DR 1-102(A) (1) (asserting a position merely to harass); DR 7-102(A) (3) (concealing or knowingly failing to disclose that which should be revealed); or DR 7-102(A) (6) (creation of false evidence). In addition, I think the record demonstrates that Walton did believe he could prove that an alteration along the lines of the exhibit he prepared had been accomplished by Childs.

My reasons for the foregoing conclusions are the following:

1. Walton did not use the fabricated document in the deposition of Childs even though it was in existence at that time. If he had had any intent of using the document as evidence it would seem that he would have confronted Childs with it.

2. It is difficult to understand what Walton had to gain by foisting the fabricated copy off as an actual photocopy. It is undisputed that the document Childs recorded was materially different than the document Childs signed. That is all that the fabricated document, if it were taken to be real, would demonstrate.

3. There was little chance of any deception succeeding. Walton did not surreptitiously fabricate the document but did so in the presence of Cowden and of Lee Holen, a contract law clerk. The record is not clear on whether other people were present, but is clear that opposing counsel, Wade, had heard that Walton had been using some white-out and a xerox machine in connection with the case, before Wade even received the fabricated document.

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4. DR 1-102(A) (5) and (6) read as follows:

MISCONDUCT

(A) A lawyer shall not:

...

(5) Engage in conduct that is prejudicial to the administration of justice.

(6) Engage in any other conduct that adversely reflects on his fitness to practice law.

4. When ambiguous responses were given by Cowden at his deposition (which was taken only one day after the fabricated document had been filed with the court) Walton promptly elicited the truth of the matter on cross examination.[5]

5. The care exercised by Walton in preparing the exhibit says as much about Walton's compulsive nature as about any

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[5] Further, at the evidentiary hearing counsel for the Bar Association, while clearly leaving room for the local disciplinary board to find intentional conduct, suggested that what was involved was unintentional conduct: "Now I would suggest that the conduct of Mr. Walton was misrepresentation. Prehaps at the most generous an accidental misrepresentation, but it still amounted to a misrepresentation to the court." [Tr 220] "Now whether there was a specific intent to deceive the bar association doesn't intend to say yes, there was a specific intent to deceive, though some of the allegations in the petition might be read to say that. ' [Tr. 222]..."Now clearly as is reported and is responded to by the second trial brief from Mr. Boyko on behalf of Mr. Walton, the case of *State v. Nicklaus* is a far more serious case of misstatements to a court system but the principle still applies and is still approved by this court. The serious misleading in pleadings is disciplinary — is a basis for discipline — disciplinary matter of something for which the bar association has brought Mr. Walton to this proceeding and something for which I suggest that you should find is a basis for discipline of Mr. Walton. There is a spectrum of appropriate penalties based on the indication of intent to deceive in the case law. Clearly in the cases where there is a strong indication of an intent to deceive and a continuing pattern of deception both before a court and the hearing committee following it, it is a far stronger basis for suspension and disbarment. The evidence is not here clear that there is an intentional deception on the part of Mr. Walton, except that he intentionally included this document in his pleadings and intentionally used the language that he did. As to whether he intended to deceive the court there's very litle evidence of that except that again he intentionally included it in the pleadings which were filed with the court. Obviously when faced with it or when the question about these documents became apparent he took steps to clear up the matter, and whatever you believe about his other actions, this certainly should be considered in his behalf. But he placed in the ocurt basket downstairs two pleadings which referred to 2-2 times to the same exhibit, and actually many more times but added the same exhibit twice. And that exhibit was a copy of a copy or an exhibit for which he talked about, which was not anything but what he'd built together out of his belief from Mr. Childs' testimony but it's something he added, pled and mistaken language, of poor judgment language, but it amounted to deception and interference with justice and a basis for discipline. Thank you."

intent to deceive.

6. Walton's "decision to ignore the warnings of a colleague regarding the possible misinterpretation of the referenced to the document" is again equally consistent with innocence as with guilt.

7. The "smoking gun" memorandum was a memo from Walton to Cowden to which the exhibit was attached. It stated, "Dear Frank: Guess what? Here's the smoking gun. Either Childs falsely testified when he said he gave Lily a copy of his deed of trust on March 2nd, or he falsely testified when he said it hadn't been altered after [executing] it. But in that case he will have difficulty explaining why he concealed the fact of its alteration. Cheers, Peter Walton." The memo was not a communication to the court or opposing counsel. It was a communication to a client that could be clarified subsequently. It does not constitute evidence of any intent to mislead the court or opposing counsel.

8. The fabricated document was attached to the amended complaint. It appears that the motion to dismiss was of no particular consequence and that Walton was told by Wade before the opposition was filed that Wade was going to withdraw the motion to dismiss.[6]

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[6] The foregoing paragraphs numbered 6 through 8 are in reference to the Disciplinary Board's findings of fact that:

> Respondent intended that the fabricated document attached to the Amended Complaint as Exhibit B would be understood to be a copy of an exhisting photocopy of an actual Deed of Trust. This finding is based upon the care exercised by Respondent in the preparation of the fabricated Deed of Trust, the precise nature of the references in the pleadings referring to the exhibit, the repeated references in the Amended Complaint and the Memorandum in Opposition to the Motion to Dismiss, Respondent's decision to ignore the warnings of a colleague regarding the possible misinterpretation of the references to the document, the text of "smoking gun" memorandum, Respondent's failure to notify opposing counsel or the court that the document was a fabrication the findings set forth above and the record herein.

III. SANCTION

Given my conclusion that the evidence clearly and convincingly shows that Walton violated DR 1-102(A) (5) (conduct prejudicial to the administration of justice) and DR 1-102(A) (6) (conduct that adversely reflects on his fitness to practice law), I would issue a public sensure.

APPENDIX II

IN THE SUPREME COURT OF THE STATE OF ALASKA

In the Disciplinary Matter Involving:	)	
PETER B. WALTON,	)	Supreme Court No. 6289
	)	ORDER
Respondent-Attorney	)	

Before: Burke, Chief Justice, Rabinowitz, Matthews, Compton, Justices, and Carpeneti, Superior Court Judge. [Moore, Justice, not participating].

On consideration of the petition for rehearing and the substitute personal statement by Peter B. Walton, lodged October 10, 1983 and filed October 28, 1983,

IT IS ORDERED:

The petition for rehearing is granted in part, Opinion No. 2734, filed on September 30, 1983, is amended by striking out pages 17, 18 and 19 and replacing them with the attached pages 17, 18, 19, 19a, 19b and 19c. In all other respects, the petition for rehearing is denied.

Entered by direction of the court at Anchorage, Alaska on January 3, 1984.

CLERK OF THE SUPREME COURT

ROBERT D. BACON

[Rabinowitz and Matthews, Justices, dissent. They would grant the petition for rehearing for the reasons stated in their dissenting opinion filed September 30, 1983].

ATTACHMENT TO ORDER

ccs: Justices; Counsel; The Honorable Walter L. Carpeneti; Pro Tem; West Publishing Company; Todd Commications, Inc.; All Opinion Subscribers.

Only one of the cases cited by Walton for the proposition that due process requires proof by clear and convincing evidence before an attorney may be disciplined actually concerned attorney discipline,[7] and that case did not even address the standard of proof issue, much less require proof by clear and convincing evidence.[8] A review of the leading cases and consideration of the important policy issues involved here leave us convinced that requiring proof by a preponderance of the evidence — rather than a higher standard — does not violate Walton's due process rights.

Santosky v. Kramer, 455 U.S. 745, 71 L.Ed.2d 599 (1982), provides the analytical framework for the burden of proof issue. In *Santosky*, which concerned termination of parental rights, the Court held that the proper standard of proof could be determined by the "balancing process," 455 U.S. at 754, 71 L.Ed.2d at 607, established in *Mathews v. Eldridge*, 424 U.S. 319, 335, 47 L.Ed.2d 18, 33 (1976). In that process the court must weigh the private interest involved in any given proceeding against the public's interest, and determine whether, given the relative strengths of those interests, the risk of error of an incorrect factual decision should be evenly borne or should be placed more heavily upon the public. If, because the individual's interest is greater than the public's, the risk should be placed more heavily upon the public, then a higher

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[7] Walton relies principally on Santosky v. Kramer, 455 U.S. 745, 71 L.Ed.2d 599 (1982); Addington v. Texas, 441 U.SA. 418, 60 L.Ed.2d 323 (1979); and Mathews v. Eldridge, 424 U.S. 319, 47 L.Ed.2d 18 (1976). *Santosky* concerned termination of parental rights. *Addington* termination of disability benefits under the social Security Act. For the reasons discussed below, these cases do not persuade us that due process requires proof by clear and convincing evidence in attorney discipline cases.

[8] In re Ruffalo, 390 U.S. 544, 20 L.Ed.2d 17 (1968).

standard of proof must be used.

The private interest in the present case is Walton's interest in practicing law, which is his livelihood, and his interest in protecting the integrity of his name. These are weighty interests indeed. The public interest in the present case is the public's interest in a fair and accurate judicial system, which requires that lawyers working within it act with integrity and honesty. This interest, like Walton's, is a substantial one.

This court cannot conclude, as Walton asks us to do, that his interest in practicing law and in his reputation is so much more substantial than the public's interest in a fairly and accurately functioning judicial system that we should adopt a standard of proof which puts the risk of an incorrect factual determination on the public. Lawyers are licensed by the state (through this court) to engage in activities affecting the public from which others are excluded. Their licensing includes a certification of fitness to hold the trust and confidence of the public at large, including potential clients as well as potential adversaries. The harm which would be caused by a lawyer acting unethically is substantial. Under all of these circumstances, we are unwilling to hold that the risk of an incorrect factual determination in a bar disciplinary proceeding should be placed primarily in the public. Because there are substantial interests on both sides, the risk of error[9] should be borne equally. That is accomplished by use of the preponderance of the evidence standard. Due process demands no more.

Thus, we reject Walton's position that proof by clear and convincing evidence is required as a matter of federal due process.[10] Nor does the authority that he cites persuade us that

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[9] The risk of error, in any event, should be low. There are extensive procedural protections which surround bar disciplinary proceedings. *See, e.g.*, Alaska Bar Rules II-15(f), (h), (i), (j), and II-22.

[10] Walton's argument fails to make clear whether he relies upon the due process guaranteed by the Alaska constitution or that contained in the Constitution of the United States. The two guarantees are not necessarily the same. South Dakota v. Newville, 74 L.Ed.2d 748 (1983).

such is required under the state constitution.[11]

II. FABRICATION OF FALSE EVIDENCE

Walton contends that, as a matter of law, he did not create false evidence in violation of DR 7-102(A) (6), since, according to Walton, an unverified complaint is not evidence. The Bar Association contends that the term "evidence," in this context, should not be limited to its technical meaning under the Rules of Evidence. According to the ABA, DR 7-102(A) (6) should apply to any false document concerning a critical aspect of an ongoing lawsuit, produced by manipulations outside the courtroom.

Like the ABA, we believe that the term "evidence," in this context, was meant to apply to a broader category of items than thos admissible at trial under the technical requirements of the Rules of Evidence. Documents attached to pleadings, although not always admissible evidence, are often relied upon by the court and consel in matters of importance. Opposing counsel, for example, upon seeing a document such as the one in the case at bar, might well conclude that his client's position was untenable and so advise him, despite the fact that the document was fabricated. The danger is that others will be misled, to their detriment, with a potential for harm as great as if the item had been admissible at trial.

III. EVIDENCE OF WRONGDOING

Where, as here, findings of fact entered by the Disciplinary Board are challenged in this court, "the respondent attorney bears the burden of proof in demonstrating that such findings

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[11] In re Hanson, 532 P.2d 303, 308 (Alaska 1975), held that proof by clear and convincing evidence is required in disciplinary proceedings against a judge, for alleged violations of the Code of Judicial Conduct. Today's decision affirms a lesser standard of proof in attorney discipline cases. *Hanson*, however, was not based on due process grounds. Also, in *Hanson*, the applicable statutes and rules contained *no* prescribed standard. *Id.* at 307. Here, there is a prescribed standard: proof by a preponderance of the evidence. Rule II-15(f), Alaska Bar R.

In light of today's ruling, we may be required to reevaluate our holding in *Hanson* if and when we are presented with another case involving disciplinary proceedings against a judge.

are erroneous." *In Re Simpson*, 645 P.2d 1223, 1227 (Alaska 1982). And,

> [t]hough this court has the authority, if not the obligation, to independently review the entire record in disciplinary proceedings, findings of fact made by the Board are nonetheless entitled to great weight. The deference owed to such findings derives from the responsibility to conduct disciplinary proceedings which this court has delegated to the Bar Association.

Id. at 1226-1227.

Upon review of the entire record, we conclude that the findings of the Board, in all material respects, are supported by the evidence. The findings and recommendations of the Board are AFFIRMED. Respondent Peter B. Walton is ordered suspended from the practice of law for a period of eighteen months, effective 30 days after the publication date of our opinion. Respondent is ordered to comply with the requirements of Rule II-26, Alaska Bar Rules.

IN THE SUPREME COURT FOR THE STATE OF ALASKA

In the Disciplinary Matter)
Involving:)
)
PETER B. WALTON,)
)
_____)

Case No. 6289

NOTICE OF APPEAL

COMES NOW Robert H. Wagstaff, counsel for Peter Walton, and gives notice of appeal to the Supreme Court of the United States from this Court's Opinion on Rehearing No. 2734 dated January 3, 1984. This appeal is taken pursuant to 28 USC 1257(2).

DATED this 2nd day of March, 1984, at Anchorage, Alaska.

ROBERT H. WAGSTAFF
Attorney for Peter Walton

S/ _____
Robert H. Wagstaff

I certify that a copy of the foregoing was served by mail on March 2, 1984 by mailing copies to JOHN LOHFF and STEPHEN VAN GOOR.

S/ _____

IN THE SUPREME COURT FOR THE STATE OF ALASKA

In the Disciplinary Matter Involving:	)
PETER B. WALTON,	)
	)

Case No. 6289

CERTIFICATE OF SERVICE

COMES NOW Robert H. Wagstaff, a member of the Bar of the Supreme Court of the United States, and certifies that on March 2, 1984 he filed a Notice of Appeal to the Supreme Court of the United States herein, and served by mail Stephen Van Goor, and John Lohff, counsel for the Alaska Bar Association.

DATED this 2nd day of March, 1984, at Anchorage, Alaska.

ROBERT H. WAGSTAFF
Attorney for Peter Walton

S/ _____
Robert H. Wagstaff